INDEX

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Question presented	2
Statement:	2
A. The Board's findings of fact	2
B. The Board's conclusions and order	7
C. The decision of the court of appeals	8
Summary of argument	8
Argument	13
The Board properly concluded that the Union's agency shop proposal was a form of union security permitted by the proviso to Section 8(a)(3) of the Act	13
Introduction	13
A. Under the Wagner Act, the proviso to Section 8(a)(3) was viewed as sanctioning, insofar as federal law was concerned, not only the closed shop, but also lesser forms of union security	17
B. The Taft-Hartley amendments outlawed the closed shop, but did not otherwise change the basic scheme of the p[illegible]	22
C. The agency shop is a form of union security contract closely resembling, but less restrictive of personal liberty than, the union shop	29

674249—63——1

Argument—Continued
The Board properly, etc.—Continued
Introduction—Continued
Page
D. While the legislative history of Section 14(b) tends to confirm that the agency shop is a form of union security encompassed both by that section and by the proviso to Section 8(a)(3), a contrary construction of Section 14(b) would not control the meaning of the proviso 34
Conclusion 44
Appendix 45

CITATIONS

Cases:

Alexander Primas Co., 21 WLR 219 22
Algoma Plywood Co. v. *Wisconsin Board*, 336 U.S. 301 ..... 9, 17, 18
American Export Lines, 81 NLRB 1370 28
American Seating Co., 98 NLRB 800 ..... 10, 28
Arizona Flame Restaurant, Inc. v. *Baldwin*, 26 L.C. par. 68, 647 (Ariz., 1954) 37
Arvin Industries, 104 NLRB 300 28
Cliffs Dow Chemical Co., The, 64 NLRB 1419 20
Diamond T. Motor Car Co., 64 NLRB 1225 20
Eclipse Lumber Co., 95 NLRB 464, enforced, 199 F. 2d 684 ..... 28, 33
Electric Auto-Lite Co., 92 NLRB 1073, enforced, 196 F. 2d 500, certiorari denied, 344 U.S. 823 33
Electric Vacuum Cleaner Co., 18 NLRB 591, set aside, 120 F. 2d 611, reversed, 315 U.S. 685 20
Eureka Vacuum Cleaner Co., 69 NLRB 878 20

Cases—Continued

	Page
Federal Shipbuilding & Drydock Co., 1 WLR 140	22
F. J. Kress Box Co., 97 NLRB 1109	28
Higgins v. *Cardinal Mfg. Co.*, 188 Kan. 11, 306 P. 2d 456, certiorari denied, 368 U.S. 829	37
H. J. Homan Co., 137 NLRB No. 118, 50 LRRM 1310	38-39
Injection Molding Co., 104 NLRB 639, enforced as modified, 211 F. 2d 59	33
International Association of Machinists v. *Street*, 367 U.S. 740	38
Isthmian Steamship Co., 22 NLRB 689, enforced as modified, 126 F. 2d 598	20
J. E. Pearce Contracting & Stevedoring Co., Inc., 20 NLRB 1061	20
Local 450, International Union of Operating Engineers, 122 NLRB 564, enforced as modified, 281 F. 2d 313, certiorari denied, 366 U.S. 909	33
Local 803, International Brotherhood of Boilermakers, 107 NLRB 1011, enforced, 218 F. 2d 299	33
Local 815, International Brotherhood of Teamsters, 127 NLRB 993, enforced, 290 F. 2d 99	33
M & J Tracy, 12 NLRB 916	20
Meade Electric Co. v. *Hagberg*, 129 Ind. App. 631, 159 N.E. 2d 408	4
Mechanics Educational Society of America, 109 NLRB 838, enforced, 222 F. 2d 429	33
Mill B., Inc., Matter of, 40 NLRB 346	20
Motor Coach Employees v. *Stage Lines* (D. Nev.), 49 LRRM 2732	37
National Automotive Fibres, Inc., 121 NLRB 1358, enforced as modified, 277 F. 2d 779	33

Cases—Continued

	Page
National Electric Products Corp., 3 NLRB 475	20
National Labor Relations Board v. *Electric Vacuum Cleaner Co.*, 315 U.S. 685	22
National Labor Relations Board v. *Food Fair Stores*, 307 F. 2d 3	33
National Labor Relations Board v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342	16
Opinion on Legality of Union Maintenance Clauses, 10 LRR 1294	20
Pape Broadcasting Co., 104 NLRB 29, enforced as modified, 217 F. 2d 197	33
Peerless Tool & Engineering Co., 111 NLRB 853, enforced, 231 F. 2d 298, certiorari denied, 352 U.S. 833	33
Peninsular & Occidental Steamship Co., 5 NLRB 959, set aside, 98 F. 2d 411, certiorari denied, 305 U.S. 653	20
Phelps-Dodge Copper Products Corp., 63 NLRB 686	20
Philadelphia Iron Works, 103 NLRB 596, enforced, 211 F. 2d 937	33
Pilot Radio Corp., 14 NLRB 1084	20
Pressed Steel Car Co., 89 NLRB 276	28
Public Service Company of Colorado, 89 NLRB 418	9, 20
Radio Officers' Union v. *National Labor Relations Board*, 347 U.S. 17	31–32, 33
Retail Clerks International Association, Local 1625 v. *Schermerhorn*, No. 368, this Term	13
Schermerhorn v. *Local 1625, Retail Clerks*, 141 So. 2d 269, certiorari granted, No. 368, this Term	12, 37, 42
Southern Colorado Power Co., 18 WLR 314	21
Union Starch & Refining Co., 87 NLRB 779	29

Cases—Continued

	Page
Union Starch & Refining Co. v. *National Labor Relations Board*, 186 F. 2d 1008, certiorari denied, 342 U.S. 815	32
Utley Co., 108 NLRB 295, enforced, 217 F. 2d 885	33
Waterfront Employers of Washington, 98 NLRB 284, enforced, 211 F. 2d 946	33
Waterman Steamship Corp., 7 NLRB 237, modified, 103 F. 2d 157, modification reversed, 309 U.S. 206	20
West Steel Casting Co., 98 NLRB 153	28
Statutes:	
Act of October 22, 1951, 65 Stat. 601	23
National Labor Relations Act, 49 Stat. 449, Sec. 8(3)	17, 22
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):	
Sec. 7	8, 15, 30, 35, 41, 43, 45
Sec. 8(a) (1), (3), (5)	2, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 23, 29, 31, 34, 35, 37, 41, 43, 45.
Sec. 14(b)	11, 12, 13, 27, 34, 35, 36, 37, 38, 41, 42, 43, 46
War Labor Disputes Act, 57 Stat. 163	21
Burns' Ind. Statutes Ann., Sec. 40-2703 (P.S.C. Acts of 1957) Ch. 19, Sec. 3	3
Miscellaneous:	
Agency Shop, The, Fortune Magazine, January 1961, p. 176	15
Agency Shop, The: A Lawful Form of Union Security? 57 N.W.U.L. Rev. 75, 86-88 (1962)	36
Chamberlain, *The Problem of Union Security*, Proceedings of the Academy of Political Science, Vol. XXVI, pp. 11-13 (1954)	15

Miscellaneous—Continued

Page

93 Cong. Rec. 3837, 2 Leg. Hist. (1947) 25

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93 Cong. Rec. 4135, 4432, 4191, 2 Leg. Hist. (1947) 1061–1062, 1199, 1094 25

93 Cong. Rec. 4887, 2 Leg. Hist. (1947) 1422 .. 10, 27

Collective Bargaining Negotiations and Contracts, Bureau of National Affairs, vol. 2, Sec. 87: 1–2 14

Hearings before the Committee on Labor and Public Welfare, United States Senate, 80th Cong., 1st Sess., S. 55 and S.J. Res. 22, pp. 64–67 27

Comparison of S. 2926 and S. 1958, 28–29, 1 Leg. Hist. (1935) 1353–1355 19

Cox, *Federalism in the Law of Labor Relations*, 67 Harv. L. Rev. 1297 39

H. Rep. No. 245, 80th Cong., 1st Sess. 4, 34, 44, 1 Leg. Hist. (1947), 295, 325, 335 .. 35, 36, 40

H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 41, 44, 60, 1 Leg. Hist. 545, 548, 564 .. 24, 26, 36

H. Rep. No. 969, 74th Cong., 1st Sess., 17, 2 Leg. Hist. (1935) 2927 18

82 Monthly Lab. Rev. 1340, 1352 14

1 Lab. Arb. Rep. 439, 17 LRRM 2782 26

S. Rep. No. 105, 80th Cong., 1st Sess., 3, 6–7, 21–22, 1 Leg. Hist. (1947) (G.P.O., 1948), 407, 409, 412–413, 427–428 .. 24, 25, 26, 40

S. Rep. No. 573, 74th Cong., 1st Sess., 11–12, 2 Leg. Hist. (1935) (G.P.O., 1949), 2311 .. 18

Union Security and Checkoff Provisions, National Industrial Conference Board, Studies in Personnel Policy No. 127, 84–87 (1952) .. 14

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 404

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GENERAL MOTORS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 111–115) is reported at 303 F. 2d 428. The original decision and order of the National Labor Relations Board (R. 10–52) is reported at 130 NLRB 481, and the Board's supplemental decision and order (R. 53–73), vacating the original decision, is reported at 133 NLRB 451.

JURISDICTION

The opinion and judgment of the court of appeals was entered on June 8, 1962 (R. 110). The petition

for a writ of certiorari was filed on September 4, 1962, and was granted on November 19, 1962 (R. 116; 371 U.S. 908). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 45–46.

QUESTION PRESENTED

Whether an "agency shop"—which leaves union membership optional with the employee but requires that as a condition of continued employment he must nonetheless pay to the union a sum of money equivalent to the initiation fee and periodic dues paid by union members—is a form of union security sanctioned by the proviso to Section 8(a)(3) of the National Labor Relations Act, where such arrangement would be valid under State law.[1]

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

General Motors Corporation (the "Company") is a Delaware corporation engaged in the manufacture of automobiles and related products in Michigan and in

[1] The Board found that the Company refused to bargain in violation of Section 8(a)(5) of the Act by declining to discuss the Union's agency shop proposal. The propriety of the 8(a)(5) finding turns on the validity of the agency shop proposal.

other States (R. 12).[2] Its employees are represented for collective bargaining purposes by the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL–CIO (the "Union"), in a single, multi-plant, company-wide unit certified by the Board (R. 12, 56). The employees involved in this case are employed at the Company's plants and facilities in Indiana (R. 56).

The National Agreement in effect between the Company and the Union provides for maintenance of union membership and a union shop throughout the bargaining unit, under which employees are obligated to acquire and maintain membership in the Union as a condition of continued employment "to the extent of paying an initiation fee and the membership dues uniformly required" by the Union (R. 54; 101–102). These provisions do not apply, however, to any employees "employed in any state which prohibits, or otherwise makes unlawful, membership in a labor organization as a condition of employment" (R. 54; 79–80, 94). The union shop and maintenance-of-membership provisions of the National Agreement have never been made operative in Indiana, where a State statute known as the Indiana Right-to-Work Law[3] renders void and unenforceable any agreement conditioning employment upon union membership (R. 55–56; 79–80). None of the Company's Indiana employees has been required to become or remain a

[2] References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[3] Burns' Ind. Statutes Ann. Sec. 40-2703 (P.S.C. Acts of 1957, Ch. 19, Sec. 3).

union member, and some do not wish either to become members[4] or to contribute to the Union's financial support (R. 76-77, 79-80).

On June 19, 1959, the Indiana Appellate Court, Second Division, held that an "agency shop" arrangement is valid in the State of Indiana. *Meade Electric Co.* v. *Hagberg,* 129 Ind. App. 631, 159 N.E. 2d 408. The term "agency shop" is used to define a contractual provision under which the employer undertakes to require all employees to contribute financial support to the union by paying a sum equivalent to the regular initiation fees and dues; the employee is not required to join the union and makes the payment upon the ground that the union is his bargaining agent because it has been selected by a majority of the employees in the bargaining unit as the exclusive representative for that unit.

The Union, by letter of October 20, 1959, made a proposal to the Company that a supplement to the existing agreement be negotiated providing for an agency shop arrangement "generally similar to that set forth in the *Meade Electric Co.* case." Under the proposed supplement the continued employment of all employees at the Company's plants in Indiana would be conditioned upon the payment of sums equal to the initiation fee and the regular monthly dues paid by union members at each location (R. 54-55; 74, 82, 99-100). Union membership would be avail-

[4] The National Agreement makes it mandatory upon the Union to accept into membership every employee who tenders the requisite initiation fees and dues (R. 60; 101-102).

able to the Indiana employees, at their option, upon tender of the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership (R. 60–61). Those employees who elected to join the Union were to accede to all the benefits, burdens and other incidents of membership on a non-discriminatory basis (R. 60). Those employees who chose not to join the Union were to be carried upon the Union's rolls as paying non-members and extended the right, under the Union's Constitution, to participate equally with members in the benefits flowing from the Union's use of such moneys for strike benefits, educational and retired members benefits, union publications, and the like (R. 60–62; 86–90, 95–97). As non-members, however, such employees were not to share in the other benefits or the burdens of membership, and were to have neither the duty nor the right to attend union meetings, to vote upon the ratification of agreements negotiated by the Union, or to participate in the Union's intra-organizational affairs (R. 86–87, 92).

As explained by Leonard Woodcock, the Union's vice-president and director of the General Motors Department, under the Union's proposal employees required to pay the amount of the initiation fee and of the monthly dues would be "entitled to the same benefits as a member unless they themselves choose not to make them available to them" (R. 61; 90, 86). According to Woodcock, the Union's Constitution, although written in the sense of membership, has been construed in practice to extend to non-members

under agency shops the right to receive the benefits previously enumerated (R. 61; 90, 104–108).

The Company, by letter of October 27, 1959, declined to bargain about the Union's request on the ground that an "'agency shop' arrangement * * * as * * * detailed in your letter of October 20, 1959, would violate the National Labor Relations Act, as amended, if incorporated in a collective bargaining agreement" (R. 55; 75–76, 102–103).

Following the Company's refusal to bargain, the Union filed a charge that the Company had committed an unfair labor practice by refusing to bargain collectively, in violation of Sections 8(a) (5) and (1) of the National Labor Relations Act. A complaint issued; a hearing was held before a trial examiner; and the case was then transferred directly to the Board.[4]

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[4] The Company, in its answer to the complaint, admitted the Union's demand for bargaining and the Company's refusal to comply, but denied having committed an unfair labor practice (R. 8–9). At the hearing upon the complaint, the parties, after stipulating to the facts and taking the testimony of Vice President Woodcock of the Union, waived further proceedings before the Trial Examiner, and the case was transferred directly to the Board. In its original decision and order, the Board (with two members dissenting) concluded that no unfair labor practice had been committed, and directed dismissal of the complaint (R. 10–52). The General Counsel and the Union filed motions for reconsideration (R. 108–110); the Board granted the motions, vacated its previous decision and order, and issued the decision discussed in the text.

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board (one member dissenting) concluded that the Company's admitted refusal to bargain concerning the Union's agency shop proposal violated Sections 8(a)(5) and (1). In the Board's view, the Union's proposal "concerning a clause which would leave the final decision as to membership or non-membership with each individual employee, *at his option,* but * * * condition employment upon the payment of sums of money which would constitute each employee's share of financial support * * * fully comport[ed] with the Congressional intention in Section 8(a)(3) for the allowance of union security contracts, and, therefore, [was] a mandatory subject" for bargaining (R. 66). The Board further found that "neither Section 14(b), relating to the withdrawal of the Federal Act where State law prohibits the 'execution or application of agreements requiring membership in a labor organization as a condition of employment,' nor * * * the 'right-to-work' statute of Indiana" militated against that conclusion (R. 59).

The Board's order directs the Company to cease and desist from the violation found and from any like or related conduct. Affirmatively, the order requires the Company to bargain with the Union, upon request, concerning the Union's agency shop proposal or any like or related proposal, and to embody any understanding reached in a signed agreement (R. 68–69).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals set aside the Board's order (R. 111–115). The court concluded that the language in Section 7 of the Act, which gives employees the right to refrain from union activities "except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)," excepts "from the operation of the law only agreements *requiring* membership in a labor organization. * * * An employee involuntarily subjected to the 'agency shop arrangement,' as a condition of his employment, is not a Union member or the equivalent of it." (R. 115, emphasis supplied.)

SUMMARY OF ARGUMENT

The proposed agency shop agreement would not have violated Sections 8(a)(1) and (3) because it was covered by the proviso to Section 8(a)(3). The proviso's reference to "an agreement with a labor organization * * * to require as a condition of employment membership therein" covers not merely agreements requiring membership of all employees *in haec verba,* but all contracts calling for any lesser kind of compulsory association with, or support for, a labor organization which, but for the proviso, would violate the policy of the Act. The agency shop is such a form of compulsory unionism because, although it permits but does not require personal membership, it compels full financial support for the union and all its objectives as a condition of continued employment in the bargaining unit.

1. The union security proviso to Section 8(a)(3), as originally embodied in the Wagner Act, expressly permitted the closed shop (rather than, as now, the union shop). Its purpose, as the legislative history indicates, was to disclaim "a national policy hostile to the closed shop or other forms of union-security agreement" (*Algoma Plywood Co.* v. *Wisconsin Board*, 336 U.S. 301, 307), *i.e.*, to make clear that nothing in the Act was intended to illegalize such arrangements or to disturb their preexisting status under State law. Although Congress drafted the proviso in terms of the closed shop—the form of union security most inhibitive of personal freedom and the one whose legality was most frequently doubted—it obviously did not intend to withhold its approval from less restrictive types of union-security agreements. Accordingly, the Board consistently construed the Wagner Act proviso as not limited to the closed shop, but as covering union security contracts of all types, including preferential hiring agreements, maintenance of membership agreements, and even an agency shop arrangement similar to that proposed here (*Public Service Company of Colorado*, 89 NLRB 418).

2. In 1947, Congress amended the proviso to Section 8(a)(3), making the union shop, rather than the closed shop, the maximum form of union security permitted by federal law. There is no indication that Congress intended to upset the prior Board view that the proviso, though specifically mentioning only the most extreme form of union security sanctioned by federal law, privileges less inhibitive forms as well.

The legislative history of the amendment shows that Congress desired to remedy the most serious abuses of compulsory unionism which existed under the closed shop, but at the same time to permit agreements which would require all employees to share the cost of bargaining and thereby eliminate "free riders." Congress was aware of arrangements less restrictive than the union shop by which unions had apportioned the costs of representation among the employees in the bargaining unit, and in singling out the union shop it had no intention to preclude them. Indeed, Senator Taft analogized the Taft-Hartley union security provisions to the so-called "Rand formula," which had been devised in Canada and amounted to an agency shop (93 Cong. Rec. 4887, 2 Leg. Hist. (1947) 1422). In light of this history, the Board has interpreted the amended proviso to Section 8(a)(3) as barring the closed shop, but as privileging the union shop there specified and any less stringent arrangement under which employees are required to pay the equivalent of union dues and initiation fees to the union as a condition of continued employment. See *American Seating Co.*, 98 NLRB 800.

3. The agency shop is a type of union security agreement closely similar to, but less restrictive of personal liberty than, the union shop, and not something "entirely different," as the court below regarded it. It is inconceivable that a Congress concerned with individual liberty but aware of the unfairness of "free riders" would have allowed contracts confronting employees with an ultimatum either to join the union and pay dues or surrender their jobs, but would not

permit an arrangement offering the same alternatives plus the further option to pay the dues without having to join the union. The dominant purpose of Congress in permitting the union shop—to enable unions and employers by mutual agreement to require all employees in a bargaining unit to contribute financial support to the bargaining agent—is also the purpose and only consequence of an agency shop.

Indeed, any meaningful distinction between the two types of arrangement is further blurred by the fact that, under the second proviso to Section 8(a)(3), the only incident of union membership which is enforceable as a condition of employment is the payment of initiation fees and periodic dues. This, and only this, obligation also inheres in the agency shop.

4. Section 14(b) of the Act allows the States to prohibit "agreements requiring membership in a labor organization as a condition of employment." Since this provision is cast in the same terms as the proviso to Section 8(a)(3), there is a strong presumption that the words have the same meaning. The legislative history of Section 14(b) tends to confirm that the agency shop is comprehended by the proviso, for it shows that Congress was aware of the forms of union security other than the conventional closed or union shop and meant to embrace all of them within the ambit of State regulatory power under Section 14(b).

This is not to say that Section 14(b), or the proviso to Section 8(a)(3), encompasses every agreement requiring employees to make payments to the labor organization which represents them. A contract

requiring the employee to pay his proportionate share of the cost of services actually rendered him by the union—that is, a service fee to defray the cost of maintaining a hiring hall, of processing grievances, or of performing other functions directly beneficial to all employees in the bargaining unit—might well be outside the area of "union security" altogether, and thus be immune to State regulation under Section 14(b) and valid under the national Act quite independently of the proviso to Section 8(a)(3). (*Schermerhorn* v. *Local 1625, Retail Clerks,* 141 So. 2d 269, now pending on certiorari, No. 368, this Term, may involve such an arrangement.) The agency shop, however, is quite different in its practical consequences from such a service fee arrangement, for it requires the nonmember not only to defray the expenses of collective bargaining for which he receives a *quid pro quo,* but also to finance welfare benefits, organizational efforts, political activity and other union objectives which do not benefit him directly and which he may regard as obnoxious, if not an infringement of his personal liberty. Accordingly, even if it were held that a true service fee is not subject to State prohibition under Section 14(b), this holding would in nowise impair the conclusion that an agency shop contract, such as the one here, is a form of "compulsory unionism" within the scope both of Section 14(b) and of the proviso to Section 8(a)(3). And, indeed, even if it were held that Section 14(b) is inapplicable to the agency shop because the term "membership" is to be read with literal exactitude, the agency shop would still be sanctioned by the proviso, for in that case the term

marks an outside limit—in the one case of State power to regulate and in the other of the employer's and union's freedom of contract.

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT THE UNION'S AGENCY SHOP PROPOSAL WAS A FORM OF UNION SECURITY PERMITTED BY THE PROVISO TO SECTION 8(a)(3) OF THE ACT

INTRODUCTION

The Union sought a contract provision which left optional with the employee whether or not to become a union member but required that he nonetheless pay to the Union, as a condition of continued employment, a sum of money equivalent to the initiation fee and periodic dues paid by union members. The question presented is whether this type of arrangement, characterized as an "agency shop", is a form of union security permitted by the proviso to Section 8(a)(3) of the Act, where, as here, it is lawful under State law.*

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* The term "agency shop" as used herein refers to an arrangement whereby non-members are required to pay to the union sums equivalent to those paid by members—either an amount equal to both union dues and initiation fees or equal to dues alone. The Board is of the view that such an arrangement could be regulated by the States under Section 14(b) of the Act (see *infra*, pp. 34–43). Hence, if a State, unlike Indiana here, were to prohibit the agency shop, the Board would give effect to that policy and hold that an employer who refused to bargain about an agency shop in that State did not violate Section 8(a)(5) of the Act.

Retail Clerks International Association, Local 1625 v. *Schermerhorn*, No. 368, this Term, which has been set down for argument following the instant case, involves the question of State power under Section 14(b). The Board's views on this question are set forth *infra*, pp. 34–43.

The most familiar types of union security contracts[7] are the closed shop and the union shop. Under the former, an employee must be a member of the union in order to obtain employment; under the latter, the employee need not be a union member to obtain a job but must become one after a certain period if he desires to keep the job. The Act bans the closed shop, but the proviso to Section 8(a)(3) permits the union shop. The Union's agency shop proposal, like a union shop, would have required the employee to pay to the Union, as a condition of continued employment, the equivalent of union dues and initiation fees, but, unlike the union shop, it would give the employee an option whether to join the Union.

Arrangements of this type are now written into six percent of collective bargaining agreements, either alone or in conjunction with the union shop.[8] The

[7] We use the term "union security contract" to describe all collective bargaining agreements that protect the union, in some manner or degree, against loss of support among the employees in the bargaining unit. It includes all forms of closed shop, union shop, preference shop, agency shop, and maintenance-of-membership contract as well as such less-known agreements as those stipulating that a specified percentage of the employees must always be members of the union. As to whether a contract requiring a service fee belongs in this category, see pp. 34–43, *infra*. In most respects union security contracts are the equivalent of what their critics call "compulsory unionism."

[8] See *Collective Bargaining Negotiations and Contracts*, Bureau of National Affairs, vol. 2, sec. 87: 1–2; *Union Security and Checkoff Provisions*, National Industrial Conference Board, Studies in Personnel Policy No. 127, pp. 5, 49, 84–87 (1952); 82 Monthly Lab. Rev. 1340, 1352. See also, Brief for the AFL-CIO as *amicus curiae* in support of the petition for certiorari in this case, pp. 4–8.

agency shop has provided a compromise between the union's demand for the security granted by a closed or union shop agreement and the employer's unwillingness to compel any of his employees to join an organization as a condition of employment. The union is guaranteed the financial support required to carry on collective bargaining and to process grievances for the benefit of all the employees in the bargaining unit. Some of the money also goes to finance organizing campaigns, strikes and sundry legislative and political activities. The employer, on the other hand, is relieved from what he may consider the distasteful duty of disregarding the right of freedom of association or non-association by compelling men to become members of an organization they are unwilling to join. And the individual employee retains greater personal freedom. See Chamberlain, *The Problem of Union Security,* Proceedings of the Academy of Political Science, Vol. XXVI, pp. 11–13 (1954); *The Agency Shop,* Fortune Magazine, January 1961, p. 176.

Unless privileged by the proviso to Section 8(a)(3), the Union's proposal, if agreed to by the Company, would have violated Sections 8(a)(1) and (3) of the Act. For Section 7 gives employees the right not only "to form, join, or assist labor organizations," but also "the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." To require employees, in order to keep their jobs, to pay the equivalent of union dues and initiation fees to a labor or-

ganization under an arrangement not sanctioned by the proviso to Section 8(a)(3), restrains the exercise of the right to refrain from assisting a labor organization and also constitutes discrimination to encourage union membership within the meaning of Section 8(a)(3).

The Board's bargaining order turns on the validity of the agency shop proposal. If it was not violative of Sections 8(a) (1) and (3), it was within the area of mandatory bargaining under the Act, and the Company refused to bargain in violation of Section 8(a) (5) by declining to discuss it. *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342. If the agency shop proposal was violative of the Act, the Company was not required to bargain about it.

The court of appeals concluded that the agency shop proposal would call for unfair labor practices violating Section 8(a)(3), because the proviso refers only to agreements *requiring union membership* (*i.e.*, the union shop). In our view the words "an agreement with a labor organization * * * to require as a condition of employment membership therein" are not to be read so strictly as to limit the exception to contracts requiring membership of all employees *in haec verba*. They were used as a convenient description of all kinds of formal agreement putting pressure upon any employee to enter into association with, or otherwise support, a labor organization in a manner which, but for the proviso, would violate the Act. The agency shop is such a form of compulsory unionism because, although it permits but does not compel

personal membership, it requires full financial support for the union and all its objectives as a condition of continued employment in the bargaining unit.

This view, we submit, is supported by the legislative history, policy and administrative interpretation of both the Wagner and Taft-Hartley Acts. Even if the words are to be read more literally, however, the judgment of the court of appeals should be reversed. For in that event the words mark the outer limit of the exception carried out by the proviso and contracts, like the agency shop, which are well within the limits, are privileged against attack under the unfair labor practice provisions.

A. *Under the Wagner Act, the proviso to Section 8(a)(3) was viewed as sanctioning, insofar as federal law was concerned, not only the closed shop, but also lesser forms of union security*

Section 8(3) of the Wagner Act made it an unfair labor practice for an employer—

> [b]y discrimination in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization: *Provided,* That nothing in this act * * * or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a) * * *.

The language of the proviso, as this Court noted in *Algoma Plywood Co. v. Wisconsin Board,* 336 U.S. 301, 307, was intended to disclaim "a national policy

hostile to the closed shop or other forms of union-security agreement."[9] Congress wanted to make clear that neither the Act, nor any other federal statute, abridged the preexisting right of the employer and the representative of his employees to bargain for a closed shop or any other form of union security valid under State law. The Senate report on the bill which was ultimately enacted stated that the reason for inserting the proviso was as follows:

> * * * According to some interpretations, the provision of section 7(a) of the National Industrial Recovery Act, assuring the freedom of employees "to organize and bargain collectively through representatives of their own choosing," was deemed to illegalize the closed shop. The committee feels that this was not the intent of Congress when it wrote section 7(a); that it is not the intent of Congress today; and that it is not desirable to interfere in this drastic way with the laws of the several States on this subject.[10]

The proviso was drafted in terms of the closed shop, not because Congress wished to exclude other types of union security, but because closed shop contracts had

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[9] In *Algoma*, the chief issue was whether the States were barred from regulating maintenance-of-membership contracts on the ground that such contracts were sanctioned by the proviso to Section 8(3) of the Wagner Act. Although the Court held that the proviso was not intended to preclude the States from pursuing their own more restrictive policies in the matter of union security agreements, it appeared to assume that the proviso privileged maintenance-of-membership no less than union shop contracts.

[10] S. Rep. No. 573, 74th Cong., 1st Sess., 11-12, 2 Leg. Hist. of the NLRA, 1935 (G.P.O., 1949), hereafter designated "Leg. Hist. (1935)," 2311. See also, H. Rept. No. 969, 74th Cong., 1st Sess., 17, 2 Leg. Hist. (1935) 2927.

been the most frequent source of the doubt which the proviso sought to eliminate.

The Senate Committee, in a memorandum pointing out the differences between the final bill and an earlier draft, stated that [emphasis added]:

> * * * [u]nless this change is made as provided in S. 1958, most strikes for a closed shop or *even for a preferential shop* would by this act in effect be declared to be for an illegal purpose, and hence would be enjoinable in many States. * * *
>
> As the legislative history of 7(a) [of the National Industrial Recovery Act] demonstrates, nothing in that section was indended to deprive labor of its existing right in many States to contract or strike for a closed *or preferential shop.* [Citing legislative history and court cases.] No reason appears for a contrary view here."[11]

It is apparent that these reports used the term "closed shop" loosely, as was then often common parlance, to describe all forms of "union security agreements," as they would now be called. None of the purposes which led Congress to adopt the proviso could possibly be served by confining it to the closed shop; indeed, it is unbelievable that Congress, though disavowing any intent to illegalize the most widely criticized form of union security, should have wished to condemn other, less onerous, forms. The Board, therefore, consistently construed the Wagner Act proviso as not limited to the closed shop, but as exempting

[11] Comparison of S. 2926 and S. 1958, 28–29, 1 Leg. Hist. (1935) 1354–1355.

all types of union security contracts, if otherwise valid, from the prohibitions of the Act."[12] Indeed, in *Public Service Company of Colorado*, 89 NLRB 418, the Board held that the proviso privileged an arrangement similar to the agency shop proposal here, which provided that those employees who were not subject to the maintenance of membership clause and thus not

[12] See, *e.g.*, *National Electric Products Corp.*, 3 NLRB 475, 506, 507. (contract requiring union membership or, in the alternative, deduction of dues); *Waterman Steamship Corp.*, 7 NLRB 237, 243, modified, 103 F. 2d 157 (C.A. 5), modification reversed, 309 U.S. 206 (preferential hiring contract giving union members "preference of employment" but requiring such preference only "as vacancies occur" and not requiring the discharge of employees who refuse to join); see also, *Isthmian Steamship Co.*, 22 NLRB 689, 699, enforced as modified, 126 F. 2d 598 (C.A. 2); *Pilot Radio Corp.*, 14 NLRB 1084, 1104–1105; *Peninsular & Occidental Steamship Co.*, 5 NLRB 959, 967, 968, set aside, 98 F. 2d 411 (C.A. 5), certiorari denied, 305 U.S. 653; *M. & J. Tracy*, 12 NLRB 916, 932–934 (preferential employment contract giving members of contracting union preference for all work); see also, *J. E. Pearce Contracting & Stevedoring Co., Inc.*, 20 NLRB 1061, 1070–1073; *Phelps-Dodge Copper Products Corp.*, 63 NLRB 686 (requiring employees who were union members to maintain such membership); see also, *Eureka Vacuum Cleaner Co.*, 69 NLRB 878; *The Cliffs Dow Chemical Co.*, 64 NLRB 1419; Opinion of Robert B. Watts, NLRB General Counsel, *Opinion on Legality of Union Maintenance Clauses*, 10 LRRM 1924; *Matter of Mill B., Inc.*, 40 NLRB 346, 348 (maintenance-of-membership and union shop contract; any employee failing to maintain membership or to make application for membership, or whose application for membership was rejected, to be discharged upon written notice to the employer); see also, *Diamond T Motor Car Co.*, 64 NLRB 1225 (union shop); *Electric Vacuum Cleaner Co.*, 18 NLRB 591, 613–614, set aside, 120 F. 2d 611 (C.A. 6), reversed, 315 U.S. 685 (modified union shop; contract required new employees after a work probation period to join the contracting union, but left old employees free to join rival union, to decline to join or to drop

required to become union members, were required to pay to the union $2.00 per month "for the support of the bargaining unit."[13] Rejecting the contention that the provision was not within the proviso because it did not require union membership, the Board stated (*id.*, at 423):

> It seems clear from the Wagner Act's legislative history that the proviso to Section 8(3) was intended to be permissive and not exclusive in character. It does not appear to have been the intent of Congress to select only a *particular* type of union security agreement to be exempted from the operation of the Act. On the contrary, it is reasonable to infer that *any* agreement "as might now be legally consummated" was immunized by the terms of the proviso. Certainly, agreements affording varying measures of security to a contracting labor organization, other than "membership" guarantees, could "then" legally have been consummated in most States. [Footnotes omitted.][14]

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their membership in the contracting union, or to urge new employees to change union affiliation).

[13] Although this case was decided in 1950, it was still governed by the Wagner Act because the agreement was covered by the savings clause in Section 102 of the Labor-Management Relations Act, 1947 (see 89 NLRB at 419–420).

[14] It is also significant that the War Labor Board, which was required by the War Labor Disputes Act (57 Stat. 163, 166) to conform to the provisions of the NLRA, directed the execution or retention of contracts with "support money" provisions similar to the agency shop provision here. See, e.g., *Southern Colorado Power Co.*, 18 WLR 314, 318–319 (employees, whether or not union members, required to share equally in the cost of maintaining and operating the collective bargaining agency); *Alexander Primas Co.*, 21 WLR 219, 221 (company to deduct

There is nothing to the contrary in *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U.S. 685. The Court there said (p. 695) that the "words of the [closed shop] exception must have been carefully chosen to express the precise nature and limits of permissible employer activity in union organization." However, the Court was drawing a distinction between uncanalized employer interference with freedom of choice prior to the execution of a closed shop contract and the privilege of requiring union membership as a condition of employment after such a contract had been executed. In other words, the Court was addressing itself to the contention that, once the union had been freely selected by a majority of the employees, the proviso to 8(3) should be construed as permitting the employer, even absent a contract, to assist the union in obtaining members, and not to whether the proviso to 8(3) permitted not only closed shop contracts but also contracts providing lesser forms of union security.

B. The Taft-Hartley amendments outlawed the closed shop, but did not otherwise change the basic scheme of the proviso

Congress, in the 1947 Taft-Hartley amendments, retained the language of the original proviso to Section 8(3) that—

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union dues of members and representation fee of same amount from non-members); *Federal Shipbuilding & Drydock Co.*, 1 WLR 140, 142 (under maintenance of membership clause, employee not in good standing not to be discharged provided he agreed as a condition of employment to the deduction of his financial obligation to the union).

> nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein

but added the following:

> on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later * * * *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.[15]

On its face, this amendment indicates an intention to make the union shop, rather than the closed shop, the maximum form of union security permitted by federal law. There is no indication that Congress intended to go further and outlaw lesser types of union security arrangements or to upset the prior Board view that the proviso, though specifically mentioning

[15] There was also a requirement that the union security provision be authorized by a vote of a majority of the employees in a Board conducted election. This requirement was eliminated from the act in 1951 (65 Stat. 601).

only the most extreme form of union security sanctioned by federal law, privileges less inhibitive forms as well.

The legislative history of the Taft-Hartley amendments supports this analysis. It shows that Congress desired to remedy the most serious abuses of compulsory unionism, which existed under the closed shop, but at the same time to permit the union and the employer to continue arrangements which would require all employees to share the cost of bargaining and thereby eliminate "free riders."

Thus, the Senate Report, in explaining the amendment which was ultimately adopted, stated (S. Rep. No. 105, 80th Cong., 1st Sess., p. 6, 1 Leg. Hist. of the LMRA, 1947 (G.P.O., 1948), hereafter designated "Leg. Hist. (1947)," pp. 412–413):

> * * * on the record before us the abuses of the system have become too serious and numerous to justify permitting present law to remain unchanged. It is clear that the closed shop which requires preexisting union membership as a condition of obtaining employment creates too great a barrier to free employment to be longer tolerated. * * *[16]

[16] Among the abuses of compulsory union membership noted were (all references are to "Leg. Hist. (1947)"): preventing an employee from campaigning to displace the incumbent union with a union more to the employee's liking (S. Rep. No. 105, 80th Cong., 1st Sess., pp. 21–22, 1 Leg. Hist. 427–428; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 44, 1 Leg. Hist. 548); causing the discharge of a union member expelled from the union because he testified against a union shop steward (S. Rep. No. 105, pp. 6–7, 1 Leg. Hist. 412–413; 93 Cong. Rec. 3837, 4135, 4193, 4886, 2 Leg. Hist. 1010, 1062, 1096, 1420); expulsion

The report added, however, that many "leaders of organized labor have stressed the fact that in the absence of [union security] provisions many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost" (S. Rep. No. 105, p. 6, 1 Leg. Hist. (1947) 412). Accordingly, a compromise was adopted. Although the closed shop was barred, "employers would still be permitted to enter into agreements requiring all the employees in a given bargaining unit to become members 30 days after being hired," subject to the qualification that "expulsion from a union cannot be a ground of compulsory discharge if the worker is not delinquent in paying his initiation fee or dues" (S. Rep. No. 105, p. 7, 1 Leg. Hist. (1947) 413). These amendments, the Senate Committee concluded (*ibid.*):

> remedy the most serious abuses of compulsory union membership and yet give employers and unions who feel that such agreements promoted stability by eliminating "free riders" the right to continue such arrangements."

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and discharge of union members because of a refusal to contribute to a political fund, an attempt to run for office against the incumbent president of the international, refusal to purchase a ticket for a raffle supported by the union, and the display of an antiunion attitude (93 Cong. Rec. 4135, 4432, 4191, 2 Leg. Hist. 1061–1062, 1199, 1094).

[17] Senator Taft voiced the same view in his initial speech on the floor of the Senate explaining the amendments (93 Cong. Rec. 3837, 2 Leg. Hist. (1947) 1010):

"In other words, what we do, in effect, is to say that no one can get a free ride in such a shop. That meets one of the arguments for the union shop. The employee has to pay the union dues."

Congress was aware that there were arrangements less restrictive than the union shop by which unions had apportioned the costs of representation among the employees in the bargaining unit, and in singling out the union shop it had no intention to preclude them. The Senate Report stated that the bill "abolishes the closed shop but permits voluntary agreements for requiring such forms of compulsory membership as the union shop or maintenance of membership * * *." (S. Rep. No. 105, p. 3, 1 Leg. Hist. (1947) 409)." Moreover, Secretary of Labor Schwellenbach, in his testimony before the Senate Labor Committee, enumerated several different types of union security arrangements then in use under collective agreements, including closed shop, union shop, maintenance of membership, preferential hiring, employer encouragement of union membership (the so-called "harmony clause"), and the check-off of union dues (a device which could be used in connection with any of the preceding types of provisions). As a further example, Secretary Schwellenbach specifically cited a widely known arbitration decision by Justice Rand of the Supreme Court of Canada in a dispute involving the United Auto Workers and the Ford Motor Company of Canada. 1 Lab. Arb. Rep. 439, 17 LRRM 2782. The award denied the UAW's request for a full union shop, but directed "an automatic check-off of union dues for all employees re-

[11] See also, H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 41, 1 Leg. Hist. (1947) 545.

gardless of union membership."[19] Expressing approval of the "Rand formula," and analogizing the Taft-Hartley union security provision to that formula, Senator Taft stated (93 Cong. Rec. 4887, 2 Leg. Hist. (1947) 1422):

> the rule adopted by the [Conference] committee is substantially the rule now in effect in Canada * * *. [T]he present rule in Canada is that * * * the employee must, nevertheless, pay dues, even though he does not join the union.
>
> If he pays the dues without joining the union, he has the right to be employed. * * *[20]

In light of this legislative history,[21] the Board has interpreted the Taft-Hartley amendments as barring

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[19] Hearings before the Committee on Labor and Public Welfare, United States Senate, 80th Cong., 1st Sess., on S. 55 and S. J. Res. 22, pp. 64–67. See also, *id.*, at 806 (statement of Cecil B. DeMille).

[20] In one respect, Senator Taft did distinguish between the Canadian rule and the Committee amendments. He felt that, because the Rand formula had been imposed upon the parties by law and was not voluntarily agreed to, it amounted to "a kind of tax, if you please, for union support," and he therefore stated that "there is no constitutional way by which we can do that in the United States" (93 Cong. Rec. 4887, 2 Leg. Hist. (1947) 1422). Whether or not this view was correct, Senator Taft clearly did not regard the agency shop itself an an unconstitutional form of union security when freely entered into by the parties, nor did he suggest that it was otherwise unlawful under the Conference bill.

[21] See also the history of Section 14(b), *infra*, pp. 35–37.

the closed shop"[21] but not otherwise changing the scheme of the proviso as it operated under the Wagner Act. Thus, it has held that the proviso privileges not only the union shop but any less stringent arrangement under which employees are required to pay the equivalent of union dues and initiation fees to the union as a condition of continued employment.[22] The Board has sustained not only such lesser arrangements which impose a formal membership requirement, like a maintenance of membership agreement," but also arrangements which impose no such requirement. In *American Seating Co.*, 98 NLRB 800, the Board held that the Taft-Hartley proviso was applicable to an agreement which contained, in addition to the usual union shop provision, a provision excepting any employee "who has religious objections to union membership" from the requirement of membership but requiring him to pay into the union welfare fund sums equivalent to the union dues. The Board stated (*id.*, at 802):

> As the precise language of the 8(3) proviso in the Wagner Act was continued in the amended Act with certain added qualifications not pertinent here, and because the legislative history of the amended Act indicates that Congress intended not to illegalize the practice of obtaining

[21] This includes agreements requiring union membership as a condition of employment as well as those giving a preference in hiring to union members. See *American Export Lines*, 81 NLRB 1370; *F. J. Kress Box Co.*, 97 NLRB 1109.

[22] See *Pressed Steel Car Co.*, 89 NLRB 276; *West Steel Casting Co.*, 98 NLRB 153; *Arvin Industries*, 104 NLRB 300.

> support payments from nonunion members who would otherwise be "free riders," we find that the provision for support payments * * * does not exceed the union security agreements authorized by the Act. [Footnotes omitted.]

See also, *Union Starch & Refining Co.*, 87 NLRB 779, discussed *infra*, pp. 32–33.

C. The agency shop is a form of union security contract closely resembling, but less restrictive of personal liberty than, the union shop

The court below misconceived the nature of the union security contracts permitted by the proviso to Section 8(a)(3) when it held that the agency shop is "entirely different" (R. 114). Many familiar forms of union security contract omit one or more of the requirements of a true union shop. Thus, a maintenance of membership clause does not require any non-member to become a union member as a condition of employment, and many such contracts even provide an "escape period" during which members may withdraw without losing their jobs. Other contracts, less common but not unfamiliar, have provided that a specified proportion of the employees must be union members, thus freeing many individual objectors from the obligations of membership. The agency shop is also less inhibitory of individual freedom but, instead of freeing some of the employees from all the obligations of union membership, it frees all the employees from the personal, and retains the financial, obligations. It is inconceivable that a Congress that was concerned with individual liberty but aware of

the unfairness of "free riders" would have allowed contracts confronting employees with an ultimatum either to join the union and pay dues or surrender their jobs, but would not permit an arrangement which offered the same alternatives, plus the further option to pay the dues without being forced to join the union.

The similarity between the union shop and the agency shop, as well as the degree of compulsory unionism involved in the agency shop, is apparent when one notes that the agency shop requires full financial support even from the employee who elects not to become a member. He must pay the initiation fee and periodic dues. This is not merely compensation for services rendered directly to employees in the bargaining unit. The money also goes to promote union organization both in the shop and elsewhere, to finance public relations, legislative and political activities and to finance strikes. While the employee is free to refrain from personal activity or association with the labor organization, the compulsion to give financial support is as complete as under the union shop.

The distinction between the union shop and agency shop is obviously unimportant in terms of the policies of the National Labor Relations Act. There is no freedom guaranteed by Section 7 that the union shop leaves unimpaired but the agency shop curtails. There is no danger that the agency shop would force employees into an inferior position as "taxpayers" without the rights of "citizens," for the Union's proposal called for offering every employee full member-

ship. The dominant purpose of Congress in permitting the union shop was to enable unions and employers, by mutual agreement, to require all the employees in a bargaining unit to contribute full financial support to the bargaining agent (see *supra*, pp. 24–27). This is the purpose and only consequence of an agency shop.

Indeed, any meaningful distinction between the two types of arrangement is further blurred by the fact that the only obligation of union membership which can be enforced under the union shop by threatening the employee's job is the obligation to pay membership dues and initiation fees, the sole obligation that the agency shop, too, imposes. Thus, the second proviso to Section 8(a)(3) provides that the employer may not discharge an employee under a union shop agreement—

> * * * (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to render the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership * * *.

In *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 40–41, this Court stated (emphasis added):

> The policy of the Act is to insulate employees' jobs from their organizational rights. * * * The only limitation Congress has chosen to impose * * * is specified in the proviso to § 8(a)(3) which authorizes employers to enter

> into certain union security contracts * * *. [*The*] ***legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus Congress recognized the validity of unions' concern about "free riders,"*** i.e., employees who receive the benefits of union representation but are unwilling to contribute their fair share of financial support to such union, ***and gave the unions the power to contract to meet that problem*** while withholding from unions the power to cause the discharge of employees for any other reason. * * *

In *Union Starch & Refining Co.* v. *National Labor Relations Board,* 186 F. 2d 1008, certiorari denied, 342 U.S. 815, the Seventh Circuit affirmed the Board's holding that "employees who request union membership and tender initiation fees and dues, but fail to comply with other union-imposed conditions for acquisition of membership, are protected by the Act from discharge under the terms of a valid union security agreement" (*id.* at 1010).[24] The court found "that [the Board's] interpretation was in harmony with the purpose of Congress to prevent utilization of union security agreements except to compel payment of dues and initiation fees" (*id.* at 1012). Similarly, the courts have repeatedly affirmed Board holdings that the loss of membership in good standing occasioned by factors other than a failure to pay

[24] The employees had declined, for religious reasons, to take the oath which the union required as a condition of membership.

initiation fees and periodic dues—*e.g.*, non-payment of fines and assessments,[25] refusals to participate in union activities such as picketing,[26] participation in dual union activities,[27] and noncompliance in other respects with a union's internal rules of membership[28]—will not support a discharge even though based upon a valid compulsory membership contract. As the Board stated in its decision below (R. 64), even "in those cases * * * where 'membership' is specifically required in a valid union-security contract, the union in particular situations cannot enforce the

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[25] *National Labor Relations Board* v. *Food Fair Stores*, 307 F. 2d 3 (C.A. 3); *National Automotive Fibres, Inc.*, 121 NLRB 1358, enforced as modified, 277 F. 2d 779 (C.A. 9); *Injection Molding Co.*, 104 NLRB 639, 645, enforced as modified, 211 F. 2d 59 (C.A. 8); *Peerless Tool & Engineering Co.*, 111 NLRB 853, enforced, 231 F. 2d 298 (C.A. 7), certiorari denied, 352 U.S. 833.

[26] *Eclipse Lumber Co.*, 95 NLRB 464, enforced, 199 F. 2d 684 (C.A. 9); *Waterfront Employers of Washington*, 98 NLRB 284, 318, 320, enforced, 211 F. 2d 946, 950 (C.A. 9); *Local 450, International Union of Operating Engineers*, 122 NLRB 564, 567, enforced as modified, 281 F. 2d 313, 316 (C.A. 5), certiorari denied, 366 U.S. 909.

[27] *Local 815, International Brotherhood of Teamsters*, 127 NLRB 993, enforced, 290 F. 2d 99 (C.A. 2); *Pape Broadcasting Co.*, 104 NLRB 29, enforced as modified, 217 F. 2d 197 (C.A. 5); *Utley Co.*, 108 NLRB 295, enforced, 217 F. 2d 885 (C.A. 6); *Mechanics Educational Society of America*, 109 NLRB 838, enforced, 222 F. 2d 429 (C.A. 6).

[28] *Philadelphia Iron Works*, 103 NLRB 596, enforced, 211 F. 2d 937 (C.A. 3); *Local 803, International Brotherhood of Boilermakers*, 107 NLRB 1011, enforced, 218 F. 2d 299 (C.A. 3); *Electric Auto-Lite Co.*, 92 NLRB 1073, enforced, 196 F. 2d 500 (C.A. 6), certiorari denied, 344 U.S. 823; cf. *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 30–32.

actual membership requirement but can obtain at most the periodic dues and initiation fees."

In short, these decisions clearly show that, under the second proviso to Section 8(a)(3), the only incident of union membership which is enforceable as a condition of employment is the payment of initiation fees and periodic dues. This, and only this, obligation also inheres in the agency shop. Thus, the same limited statutory policy—barring "free riders" by permitting the costs of collective bargaining to be allocated among all the employees who benefit from it, members and nonmembers alike—is just as well served by the agency shop arrangement contemplated here as by the more conventional arrangement requiring full-fledged union membership. Conversely, the type of agency shop involved in this case, which permits any employee who wishes to become a member of the union, has no consequences not also incident to a permitted union shop.

D. While the legislative history of Section 14(b) tends to confirm that the agency shop is a form of union security encompassed both by that section and by the proviso to Section 8(a)(3), a contrary construction of Section 14(b) would not control the meaning of the proviso

Section 14(b), added by the Taft-Hartley amendments in 1947, provides:

> Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Section 8(a)(3), as explained above, provides that nothing in federal law shall preclude an employer from making—

> an agreement with a labor organization * * * to require as a condition of employment membership therein * * *

And Section 7 qualifies the guaranteed rights of employees—"except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)."

Since the three provisions use the same words, there is a strong presumption that they have the some meaning. The legislative history of Section 14(b) would therefore seem to throw light upon the meaning of Sections 7 and 8(a)(3), and the history tends to confirm the view that an agency shop agreement—*i.e.* a contract requiring employees in the bargaining unit to pay the full initiation fees and dues with individual freedom of choice about joining the union—is comprehended within the area carved out by the proviso as an exception to the other provisions of the Act. For the legislative history shows that Congress was aware of the forms of union security other than the conventional closed or union shop, and that it intended to embrace all of them within the area that the States would be permitted to regulate under Section 14(b). Thus, the House Committee Report (H. Rep. No. 245, 80th Cong., 1st Sess. 34, 1 Leg. Hist. (1947) 325), in enumerating the State laws respecting compulsory unionism which would not be displaced by the

NLRA, listed several which specifically banned not only agreements conditioning employment on union membership, but also contracts requiring merely the payment of the equivalent of dues or initiation fees."

The House Conference Report also stated (H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 60, 1 Leg. Hist. (1947) 564, emphasis added):

> Under the House Bill there was included a new section 13 of the National Labor Relations Act to assure that nothing in the act was to be construed as authorizing any closed shop, union shop, maintenance of membership, *or other form of compulsory unionism agreement* in any State where the execution of such agreement would be contrary to State law. Many States have enacted laws or adopted constitutional provisions to make *all forms of compulsory unionism* in those States illegal. It was never the intention of the National Labor Relations Act * * * to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism. * * * To make certain that there should be no question about this, section 13 was included in the House bill. The conference agreement, in section 14(b), contains a provision having the same affect.[30]

Thus, the purpose of Section 14(b) was to meet the fear that the amendment to the proviso to Section 8(a)(3) outlawing the closed shop would inspire the

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[29] *E.g.*, the laws of Alabama, Arkansas, Georgia and Tennessee. See *The Agency Shop: A Lawful Form of Union Security?*, 57 N.W.U.L. Rev. 75, 86–88 (1962).

[30] See also, H. Rep. No. 245, 80th Cong., 1st Sess. 44, 1 Leg. Hist. (1947) 335.

inference that Congress had taken hold of the subject of union security and ousted State jurisdiction. Section 14(b) was aimed at preserving for the States the same freedom which they had previously enjoyed to regulate all forms of compulsory support for labor organizations, just as the historic purpose of the proviso has been to preserve for employers and labor organizations representing a majority of the employees their freedom from federal restrictions against the negotiation of contracts requiring compulsory support. Accordingly, Section 14(b) has been held to authorize State prohibition of agency shop agreements.[31]

This is not to say that Section 14(b), or the proviso to Section 8(a)(3), encompasses every agreement requiring employees to make payments to the labor organization which represents them. Some such arrangements, unlike the agency shop, may be wholly outside both provisions. But the agency shop itself, although it does not require an unwilling employee to become a union member in the exact sense of the term, does require such very substantial support of the organization and its objectives as to be a form of "union security" and, conversely, of "compulsory unionism." Under the agency shop the non-member

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[31] See *Higgins* v. *Cardinal Mfg. Co.*, 138 Kan. 11, 306 P. 2d 456, certiorari denied, 368 U.S. 829; *Motor Coach Employees* v. *State Lines* (D. Nev.), 49 LRRM 2732; *Arizona Flame Restaurant, Inc.* v. *Baldwin*, 26 L.C. par. 68, 647 (Ariz., 1953). See also, *Schermerhorn* v. *Local 1625, Retail Clerks*, 141 So. 2d 269, pending on certiorari No. 368, this Term.

pays the full amount of initiation fee and periodic dues. His payments go to defray not only expenses of collective bargaining for which he receives a *quid pro quo*—such as the cost of negotiating contracts, handling grievances and taking cases to arbitration—but also to finance welfare benefits and promote unionization, lobbying and political activity. Thus, while an agency shop agreement may leave a non-member free of what he deems a distasteful personal association, he is nevertheless required to finance the promotion of the union's objectives—objectives that do not benefit him directly and that he may regard as obnoxious, if not an infringement of his personal political liberty. Cf. *International Association of Machinists* v. *Street*, 367 U.S. 740.

Many practical consequences, and therefore perhaps the legal effect, of a contract requiring non-members to pay a fee proportionate to the cost of services given and received are altogether different from incidents of the agency shop. The plainest illustrations are those calling for the payment of specific sums. For example, a union which operates an exclusive hiring hall or job referral system renders to both members and non-members a service which it is expensive to provide, and the union may therefore wish to charge non-members a fee for this service equivalent to their proportionate share of the cost. It would seem plain that such an arrangement is not open to State regulation by Section 14(b) as a form of compulsory unionism. Its legality under the National Labor Relations Act was sustained in *H. J.*

Homan Co., 137 NLRB No. 118, 50 LRRM 1310. To cite another example, arbitration imposes a heavy burden upon a local union. A union might seek to meet the problem by a kind of "insurance"—by requiring each employee who wished to have his future grievances taken to arbitration to contribute a proportionate share of the estimated cost of arbitrating grievances during the ensuing year. If a provision requiring employees to contribute a proportionate share of the estimated costs of arbitrating grievances as a condition of employment were put into a collective bargaining agreement, the scheme would become compulsory, but surely a State could not prohibit the arrangement as a contract requiring membership in a labor organization. And since the arrangement would pertain more to the institutional arrangements for determining terms and conditions of employment than to the substantive terms and conditions, we think it removed from other State control by federal preemption. Cf. Cox, *Federalism in the Law of Labor Relations*, 67 Harvard L. Rev. 1297, 1324.

The question obviously is closer when the service fee covers the cost of more of the benefits that employees in a bargaining unit receive from the union's activities as their representative. With each additional contribution to the cost of some union function the degree of compulsory association becomes more intimate, and it is evident that as refinements develop the question becomes one of drawing a line between fairly clear extremes.

In terms of the avowed objectives of the legislation the line might well be found to fall between the agency shop and a true service fee covering all cost of collective bargaining but not of legislative or political activities. Two of the most severe criticisms of compulsory unionism were that the closed shop restricts the freedom of the employer in hiring the most qualified workers by forcing him to accept a union member, and that some unions were exercising monopoly power by artificially restricting the supply of labor.[32] The amendments outlawing the closed shop as a matter of federal law took care of these objections. A third criticism was that unions used the disciplinary power to expel a member and thus deprive him of his job arbitrarily and in such a way as to curtail personal liberty.[33] These abuses are eliminated by the provision that no employee may be discharged by reason of non-membership if he has tendered the initiation fee and periodic dues. Union security contracts were also deemed objectionable because the employees' dues were used to finance objectives to which some individuals were personally opposed; political support of a candidate opposed by individual union members is the closest illustration. The problem was partially met in the federal sphere by Section 304 of the Labor Management Relations Act, which prohibits any union "contribution or expenditure" in a federal primary or election. That protection, however, is incomplete

[32] S. Rep. No. 105, 80th Cong., 1st Sess., pp. 6–7, 1 Leg. Hist. (1947) 407, 412, 413; H. Rep. No. 245, 80th Cong. 1st Sess., p. 4, 1 Leg. Hist. (1947) 295.

[33] Ibid. See also fn. 16, pp. 24–25.

because it does not apply to lobbying and similar political activity, to contributions in State election campaigns or to expenditures in union organizing drives and similar activities that promote the objectives of the union but yield no direct returns to the individual employee. So far as one can judge from the legislative history, the purpose of Section 14(b) was to enable the States to deal with these problems, as some viewed them, left untouched by federal law. Since none of the alleged faults of compulsory unionism is created by the requirement of a service fee limited to the expenses of collective bargaining, it seems improper to associate a service fee with the compulsory unionism that Section 14(b) was intended to allow the States to prohibit.

On the other hand, if contracts providing for the payment of a service fee as a condition of employment are valid under the national act and immune from State regulation, it must be upon the ground that such an arrangement is wholly outside the area covered by the proviso to Section 8(a)(3) and by Section 14(b), yet does not interfere with rights guaranteed by Section 7 because the payment for consideration received is not assistance or participation in collective bargaining within the meaning of Section 7 and does not encourage or discourage union membership. This conclusion is difficult to reconcile with the widespread congressional assumption that it was necessary to permit union security contracts in order to avoid the unfairness of free riders who accept the benefits of collective bargaining but refuse to pay the expenses. This was

undeniably the dominant rationale of the proviso. A partial explanation may be that in 1947 there were few contracts, if any, that distinguished between a service fee and the full payment of union dues. The question was conceived in broader terms than necessary—whether the full dues might be required or nothing. But the explanation is only partial, and the difficulty remains an obstacle to the proposed interpretation of Section 14(b).

The National Labor Relations Board has had no occasion to rule upon whether a contract requiring payment of a true service fee as a condition of employment is outside the scope of Section 14(b) and otherwise consistent with the policies of the Act. It is also possible that the Court will find it unnecessary to reach a decision in the pending *Schermerhorn* case (*supra,* fn. 31, p. 37) for, as we are informed, the fee required under that contract may be equal to the full union initiation fee and dues. Although it is conceivable that the full initiation fee and dues are used for the direct expenses of collective bargaining and no part for the union's other activities, this would be an unusual allocation of revenue. Consequently, it might be thought advisable, before passing upon the legal issues, to determine the exact character of the payments involved. Having pointed out the consider-

ations, however, our primary concern is to show that a ruling that a contract calling for a true service fee is not subject to State regulation or prevention under Section 14(b) would not require the conclusion that the agency shop is not protected by the proviso to Section 8(a)(3), for on this point the foregoing distinctions seem plainly determinative.

Indeed, the decision below should be reversed even if Section 14(b) is inapplicable to an agency shop. For if the phrase "agreements requiring membership in a labor organization" is to be read with literal exactness instead of as a general description of union security agreements (as we have contended), then the term marks an outside limit—in the one case of State power to regulate and in the other of the employer's and union's freedom of contract. See Brief for American Federation of Labor and Congress of Industrial Organizations, pp. 18–20. In that event, the two areas are not coextensive. The freedom to negotiate an agreement requiring membership as a condition of continued employment would then incorporate permission to negotiate a contract imposing all the lesser included obligations not as restrictive of the freedoms guaranteed by Section 7. But the State's privilege to regulate the more restrictive contracts would not necessarily authorize it to reach further and prohibit less onerous agreements.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the case should be remanded with directions to enforce the Board's order.

Respectfully submitted.

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FEBRUARY 1963.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> SEC. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such em-

ployment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; * * * and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

SEC. 14. (b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

U.S. GOVERNMENT PRINTING OFFICE 1947